



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of  
Aristotle International, Inc.

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MUR 5625

**STATEMENT OF REASONS**

**Chairman MATTHEW S. PETERSEN and  
Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN**

This matter was initiated by a complaint filed by National Geographic and Political Software, Inc. (“NGP”), a political compliance and reporting software consultant. In its complaint, NGP alleged that its competitor, Aristotle International, Inc. (“Aristotle,” or “Respondent”), knowingly and willfully violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by gathering individual contributor data from the FEC website and offering that data for sale to its customers in violation of the Act’s “sale or use” prohibition.

After an investigation, the Office of General Counsel (“OGC”) recommended that the Commission find probable cause to believe that Aristotle violated the Act. After considering the entire record in this matter, including but not limited to the persuasive arguments offered by Aristotle in both its briefs and oral presentation,<sup>1</sup> we voted to reject OGC’s recommendation to find probable cause to believe Aristotle violated the Act,<sup>2</sup> and this statement explains the basis for our vote.

First, the complainant based its complaint solely upon one prior Commission advisory opinion (AO 2004-24) that the complainant itself sought and which was materially

<sup>1</sup> We hereby incorporate by reference all briefs and other submissions submitted by Aristotle as further support for our conclusions.

<sup>2</sup> MUR 5625, Certification dated Mar. 17, 2010.

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distinguishable from the facts at issue here.<sup>3</sup> Contrary to the facts presented by complainant in AO 2004-24, this matter concerns a specific compliance/vetting feature that does not enhance FEC data.<sup>4</sup> Aristotle's Campaign Manager 5 software program has more than 400 features, and the compliance/vetting feature at issue is one of more than 50 new features Aristotle offered as part of a free upgrade to its existing customers in the spring of 2004. It is the only feature of the more than 400 total features that provides access to any FEC data. And that access is limited to a restricted, non-downloadable subset of limited data that can only be accessed with respect to individuals whose names and addresses are already a part of the end-user's pre-existing database. In other words, at issue is a small part of a free upgrade that allows for additional legal compliance that can only be used with a pre-existing list.

Second, OGC's probable cause recommendation was based upon the notion that virtually any sale of any FEC data constitutes a *per se* commercial use, thus violating the Act.<sup>5</sup> But reading the Act this way is at odds with the legislative history, court cases, and prior Commission matters. And even if the language of the Act could be read in a way that reaches Aristotle's conduct, we would nonetheless exercise our prosecutorial discretion in this matter. There is no evidence that data was used in a manner inconsistent with the purpose of the sale or use prohibition, and there are legitimate compliance reasons why it is beneficial for a committee to have limited access to the sort of data Aristotle is providing.

## I. BACKGROUND

Aristotle is a political consultant that specializes in software, used by its clients to fulfill their various filing obligations regarding their political activities. At issue here is Aristotle's Campaign Manager 5 software program, the fifth iteration of its Campaign Manager software package. Campaign Manager 5 is a compliance software product that has more than 400 features, and is designed to assist users in such essential campaign management functions as

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<sup>3</sup> Of course, it is well-established that advisory opinions cannot be used as a sword, but instead are merely a shield from burdensome Commission enforcement action. *See* 2 U.S.C. § 437f. Moreover, the Supreme Court has categorically rejected any notion that one needs to obtain a favorable advisory opinion before action. *See FEC v. Citizens United*, No. 08-205, *slip op.* at 18, 558 U.S. \_\_ (2010) ("As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16<sup>th</sup> - and 17<sup>th</sup> -century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." (internal citations omitted)).

<sup>4</sup> *See* AO 2004-24 (NPG), Request at 2 ("Under this proposal, we would obtain donor contribution histories from the FEC's online public records for individuals, political committees and other persons. We would then *sort and organize these data, and match them into a client's database based on the client's needs.*") (emphasis added).

<sup>5</sup> OGC also argued that Aristotle's marketing materials and initial lack of certain prophylactic disclaimers (not required by the Act or Commission regulations) constituted evidence of a prohibited solicitation purpose (notwithstanding its acknowledgement that there was no actual misuse in fact). This, though, is really just part of OGC's overall argument that FEC data can never be used in a commercial product, regardless of purpose, unless the media exemption applies.

generating FEC and state reports, tracking contributions and expenditures, compliance with federal and state rules, fundraising, and general campaign organization.<sup>6</sup>

In the spring of 2004, Aristotle began offering the free upgrade to its Campaign Manager software package, and included in that upgrade was the compliance/vetting feature that is at issue here. The compliance/vetting feature was one of more than 50 new features Aristotle offered as part of a free upgrade to its existing customers, and is the only feature that provides access to any FEC data.<sup>7</sup> The compliance/vetting feature operates as follows:

- Campaign Manager 5 only provides access to FEC contribution information for individuals whose names and addresses the customer already has in its database. Names and addresses of contributors from FEC records are not provided through Campaign Manager 5. A user therefore cannot obtain a contributor name or address through Campaign Manager 5's FEC data feature.
- Federal contribution information obtained from the FEC may be accessed through the software only after the user has identified the individual for solicitation and then manually accessed the specific individual's pre-existing record from within its own database.
- The information is only made available in a drop-down format on a single record-by-record basis.
- The contribution record is not made available in an interactive format or one where the information may be manipulated.
- Because the FEC data is not matched into the client's database, the software also does not have the capacity to search FEC records themselves. For example, in this software environment, the user cannot search specifically for large donors or ask the system who gives to what kinds of candidates. Nor can the user utilize the FEC contributor data for any other type of automated data sorting. The user therefore cannot create any kind of lists of solicitation targets based on searches of FEC contribution history.<sup>8</sup>

Thus, the feature does not provide any names or addresses obtained from the FEC, and as a result, provides no way for a committee to create lists or find new contributors. Indeed, the committee may view a contributor's history only if the committee already has the contributor's name in its database.

About three months after Aristotle began offering its free multi-feature upgrade, NGP filed a request for an advisory opinion. In that opinion, NGP asked whether its own proposed upgrade to its software program would violate the sale or use prohibition of the Act. NGP stated that its proposed upgrade would allow NGP's clients to "see the contributions that their donors have made to other candidates, PACs and party organizations" using data obtained from the

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<sup>6</sup> MUR 5625, Response Brief at 8.

<sup>7</sup> *Id.*

<sup>8</sup> MUR 5625, Response at 11-12; *See also* MUR 5625, Response Brief at 14-16.

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FEC's website.<sup>9</sup> NGP provided no technological details about the proposed upgrade in the request or any information with respect to how it intended to integrate the data into the software except to say it would be "matched ... based on a client's needs."<sup>10</sup> Moreover, NGP did not provide any limitations on its proposed use of the data, asking instead whether it could be used "regardless of intended purpose."<sup>11</sup> NGP also confirmed the product could be used for solicitation and prospecting purposes.<sup>12</sup>

The Commission concluded that, as proposed by NGP, the "sale or inclusion of information about contributors (other than information about political committees that are contributors) obtained from the FEC's public records in NGP Campaign Office would be prohibited under the Act's restriction on the sale or use of contributor information."<sup>13</sup> Presumably due to the lack of factual detail presented by NGP in its request, the Commission provided no analysis or reasoning for its conclusion except to reiterate prior advisory opinions that "the purpose of restricting the sale or use of information obtained from FEC reports is to protect contributors from having their names sold or used for commercial purposes."<sup>14</sup> Again, presumably due to a lack of factual detail, the advisory opinion did not distinguish NGP's activities from prior advisory opinions or enforcement matters where the Commission allowed the sale and use of contributor data.<sup>15</sup>

In December 2004, NGP filed a one and a half page complaint alleging Aristotle was knowingly and willfully violating the sale and use prohibition of the Act. Specifically, NGP alleged in conclusory fashion that Aristotle was marketing a software compliance feature of the type the Commission had already concluded (in the prior advisory opinion sought by NGP), would violate the Act's sale or use prohibition.<sup>16</sup> The complaint offered no specific information about Aristotle's software feature or how the feature operated except to provide copies of Aristotle's marketing materials as evidence that Aristotle intended for its customers to use the data to solicit contributions. The complainant also cited these materials as evidence that Aristotle's violation was knowing and willful because they included warnings against the sale or use of FEC data.

<sup>9</sup> AO 2004-24 (NGP), Request at 1.

<sup>10</sup> AO 2004-24 (NGP), Request at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See also MUR 5625, Complaint at 1.

<sup>13</sup> AO 2004-24 (NGP) at 2.

<sup>14</sup> See AO 2004-24 (NGP) at 2. See also MUR 5625, Response Brief at 31 (citing AOs 1998-4, 1995-5, 1991-16, 1989-19, 1986-25, 1981-38, and 1980-101).

<sup>15</sup> *Id.* For example, in advisory opinions prior to 2004-24, the Commission consistently stated that the purpose of 2 U.S.C. § 438(a)(4) is the "prevention of list brokering," and "to protect individual contributors from having their names sold or used for commercial purpose." See AOs 1977-66 (Title Industry PAC); 1980-78 (Richardson); 1995-9 (NewtWatch). See also AOs 1980-101 (Weinberger) (the Commission distinguished between "selling impermissible contributor information and permissible contribution information," stating that, "except for information identifying individual contributors, any of the information found in FEC documents or documents filed with the Commission may be used in the subject publication"); 1989-19 (Johnson) (allowing a requestor to sell FEC data that did not identify contributors).

<sup>16</sup> MUR 5625, Complaint.

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## II. DISCUSSION

### A. Aristotle's Software Feature is Distinguishable From the One Considered in AO 2004-24.

Contrary to the assertions of the complaint and the position of OGC, the facts as presented in AO 2004-24 are distinguishable from those in this matter. In AO 2004-24, NGP presented a feature that would allow its customers to “see the contributions that their donors have made to other candidates, PACs and party organizations” using data obtained from the FEC’s website.<sup>17</sup> NGP provided no technological details about the proposed upgrade in the request or any information with respect to how it intended to integrate the data into the software except to say it would be “matched...based on a client’s needs.”<sup>18</sup> Moreover, NGP did not provide any limitations on its proposed use of the data, asking instead whether it could be used “regardless of their intended use of contributor data.”<sup>19</sup> NGP also confirmed the product could be used for solicitation and prospecting purposes.<sup>20</sup> In other words, what NGP presented appears to be a garden-variety sale of a list of FEC data, which as Aristotle itself noted would be illegal: “NGP’s request ... intended to go beyond what was permissible” under the Act.<sup>21</sup>

Aristotle’s feature, and its limited use of FEC data, is distinguishable in almost every way from NGP’s. Unlike the feature presented by NGP, Aristotle’s compliance/vetting feature is part of Aristotle’s much larger Campaign Manager 5 software program, which has more than 400 features. And the compliance/vetting feature at issue was one of more than 50 new features Aristotle offered as part of an upgrade to its existing customers in the spring of 2004. Critically, this upgrade did not increase the price of the program itself.

Moreover, this feature is the only software feature that provides access to any FEC data. And that access is limited to a restricted, non-downloadable subset of data that can be accessed only with respect to individuals whose names and addresses are already a part of the end-user’s pre-existing data base.

In other words, the data cannot be downloaded or otherwise appended to a pre-existing list. Rather, the data is to be used in assisting with compliance. Specifically, the feature allows the user to access a history of what a particular person in its database has contributed to others committees. Knowing this information assists with legal compliance in two ways. First, it lets the user know how much a person has already contributed, and thus avoids the situation of inadvertently soliciting and/or accepting a contribution that would exceed the limitations of the

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<sup>17</sup> AO 2004-24 (NGP), Request at 1.

<sup>18</sup> AO 2004-24, Request at 2.

<sup>19</sup> AO 2004-24, Request at 2.

<sup>20</sup> *Id.*

<sup>21</sup> MUR 5625, Response Brief at 46. Aristotle also asserts that “NGP’s submission described a blatantly illegal proposal, apparently to provide a predicate for filing the complaint in this matter on the pretext that NGP’s proposal described what Aristotle was doing.” Response Brief at 46. Regardless of the merits of this argument (certainly, one can circumstantially draw that conclusion), we note that when considering an advisory opinion, the Commission is merely considering the facts as presented by requestor.

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Act, and could lead to an excessive contribution.<sup>22</sup> Second, the law imposes a biennial limit on the amounts individuals can contribute to all campaigns, political parties and other political committees.<sup>23</sup> By knowing the total that a particular contributor (or even prospective contributor) has contributed to others, the end-user can avoid soliciting and/or accepting money that would violate the Act, or that would cause the end-user's contributors to violate the Act.<sup>24</sup>

In sum, the facts presented in this matter are materially different from those presented in AO 2004-24. Thus, that AO provides little guidance regarding whether the software feature at issue violated the Act's sale or use prohibition.

### **B. OGC's Reading of the Sale or Use Prohibition is Inconsistent with the Act's Legislative History, Court Decisions and Prior Enforcement Matters**

In its probable cause brief, OGC suggests that, under its reading of the Act, unless an entity came within the so-called "media exemption," it would violate the Act if one sold a product that included any FEC data (regardless of its actual purpose or use). Thus, according to OGC, "because Aristotle's software is not a communication similar to a newspaper, magazine, or book, and the principal purpose of inclusion of the data into its software upgrade is for commercial purposes," Aristotle's use of the FEC data is *per se* commercial use and violates the Act.<sup>25</sup> Such a reading of the statute would make virtually any transfer or use of FEC data a *per se* commercial purpose, which is inconsistent with the legislative history of the prohibition, as well as past judicial and agency construction of the Act.

The sale or use prohibition was enacted in the Federal Election Campaign Act of 1971, as an amendment to the section of the Act requiring reports filed under the Act to be made available for public inspection.<sup>26</sup> As the amendment's sponsor, Senator Bellmon, explained:

[T]he purpose of this amendment is to protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party. We all know how much of a business the matter of selling lists

<sup>22</sup> Certainly, the converse is true – since the data shows whether or not a contributor has given the maximum permissible amount, a user would then know precisely how much it could legally solicit from a contributor. But this is not its sole function, and does not convert what is otherwise a compliance function into a "sale" or "use," since this information originated from the committee and is already readily available from that committee's own records.

<sup>23</sup> Individuals are subject to a biennial limit on contributions made to federal candidates, party committees and political action committees (PACs). 11 C.F.R. § 100.5. The overall 2009-2010 limit is \$115,500; however, of this amount, an individual may only contribute up to \$45,600 to candidate committees. The remaining \$69,900 may be contributed to PACs and party committees; however, of the \$69,900, no more than \$45,600 of this amount may be given to committees that are not national party committees.

<sup>24</sup> Not surprisingly, a number of other third-parties offer precisely this sort of information based upon the use of FEC data – on-line, for free and with search capability. Some examples include, [opensecrets.org](http://opensecrets.org), [cqmoneyline.com](http://cqmoneyline.com), [newsmeat.com](http://newsmeat.com), and [transparencydata.com](http://transparencydata.com). All Aristotle is doing is providing what others also provide, but in a way that allows a user to access the same data quicker and more easily within a larger compliance software package, the cost of which did not increase with the addition of the particular (and limited) search feature.

<sup>25</sup> MUR 5625, General Counsel's Report #3 at 4.

<sup>26</sup> P.L. 92-225, section 308(a)(4) (Feb. 2, 1972).

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and list brokering has become. These names would certainly be prime prospects for all kinds of solicitations, and I am of the opinion that unless this amendment is adopted, we will open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment, and in that way tend to discourage them from helping out as we need to have them do.<sup>27</sup>

Senator Bellmon provided an example of how the tax division of Oklahoma "sell[s] the names of new car buyers to list brokers," and that his amendment was intended to protect contributors "from being victimized by that practice."<sup>28</sup> When asked if "the only purpose" of the amendment was to "prohibit the lists from being used for commercial purposes," as opposed to allowing a newspaper to publish the names of contributors and the amounts given, Sen. Bellmon replied, "That is right; but the list brokers, under this amendment, would be prohibited from selling the list or using it for commercial solicitation."<sup>29</sup>

The applicable statutory language states that "any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee."<sup>30</sup> The Commission's regulation implementing this prohibition states that:

(a) Any information copied, or otherwise obtained, from any report or statement, or any copy, reproduction or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committee.

(b) For purposes of 11 CFR 104.15, *soliciting contributions* includes soliciting any type of contribution or donation, such as political or charitable contributions.

(c) The use of information which is copied or otherwise obtained from reports filed under 11 CFR part 104, in newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes.<sup>31</sup>

<sup>27</sup> 117 Cong. Rec. 30,057-58 (daily ed. Aug. 5, 1971 *reprinted in* Legislative History of the Federal Election Campaign Act of 1971 at 581 (1981) (statement of Sen. Bellmon)).

<sup>28</sup> *Id.* See also MUR 5625, Response Brief at 20.

<sup>29</sup> Legislative History of the Federal Election Campaign Act of 1971 at 582. It is significant that the courts have relied on the provision's legislative history in applying the sale or use prohibition. See, e.g., *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 192 (D.C.Cir. 1986); *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190 (2d Cir. 1991); *FEC v. Legi-Tech*, 967 F. Supp. 523 (D.D.C. 1997).

<sup>30</sup> 2 U.S.C. § 438(a)(4).

<sup>31</sup> 11 C.F.R. § 104.15 (emphasis in original).

The statute, the regulation, and the legislative history show that not all uses of FEC data are banned. Instead, Congressional concern centered on two specific problematic uses of disclosed information: (1) that list brokers would simply copy the names of contributors directly from the reports and then sell those names to third parties for solicitation purposes; and (2) that commercial businesses would solicit political contributors to a degree that could constitute harassment. Thus, as Aristotle correctly observes, “Congress intended the term ‘for commercial purposes’ to apply to the sale of lists of *names* by list brokers for purposes of prospecting and targeted soliciting.”<sup>32</sup> Aristotle is not copying names and addresses from FEC reports and selling them to its customers. The compliance/vetting feature only provides the contribution history of those already in a customer’s *existing* data base. And since Aristotle is not selling new names and contact information, there is no threat of “all kinds of harassment” that was of concern when this amendment was adopted.<sup>33</sup>

Courts too have been clear about the reach of the Act’s sale and use prohibition. For example, in *FEC v. Political Contributions Data, Inc.*, the Second Circuit interpreted the “commercial purposes” prohibition “to encompass only those commercial purposes that could make contributors ‘prime prospects for *all kinds of solicitations*’ ... *i.e.*, not merely solicitations for ‘contributions’, but solicitations for cars, credit cards, magazine subscriptions, cheap vacations, and the like.”<sup>34</sup> In that case, the Commission sued a corporation for selling reports that contained information obtained from FEC reports, including the names and occupations of contributors, the names of the committees they contributed to and the amounts contributed. The reports, however, did not include the contributors’ addresses or phone numbers.<sup>35</sup> Nonetheless, the Commission, in that case, argued that “PCD’s activities fall squarely within the sweep of the ‘commercial purposes’ prohibition, since PCD sold information compiled from FEC reports for a profit.”<sup>36</sup>

The Second Circuit rejected the argument that any sale of FEC data results in a prohibited “commercial use.” The court analyzed the purpose and design of PCD’s publication and determined that the “principal purpose” of PCD’s reports was something other than a “commercial purpose,” because the absence of any contact information in the reports, such as the contributors’ addresses and phone numbers made it “virtually certain” the reports would be used

<sup>32</sup> MUR 5625, Response Brief at 20.

<sup>33</sup> It is difficult to imagine that the sale of data that is already publicly available and that is presented in such a way that it cannot lead to contributor harassment, is the sort of “commercial purpose” contemplated by Congress. Indeed, when this amendment was adopted in 1971, no one could have anticipated the technological advances that would evolve over the next 40 years, including, most notably, the impact of the Internet.

<sup>34</sup> 943 F.2d 190, 197 (2d Cir. 1991) (“*PCD*”) (citing 117 Cong.Rec. 30,057 (remarks of Sen. Bellmon) (emphasis added)). The Court drew a distinction between “solicitation purposes” and “commercial purposes,” reasoning that the prohibition against using the data for “solicitation purposes” would only cover solicitation of contributions. Thus, Congress had to add the “commercial purposes” prohibition to cover solicitations for commercial items such as, magazines, credit cards, cars, etc. *Id.*

<sup>35</sup> *Id.* at 193. PCD admitted they were selling the reports for a profit but emphasized that the reports were designed to “facilitate research into the reason why contributors, both as individuals and on behalf of their affiliated companies, favor one candidate or another, particularly in light of their congressional committee assignments.” *Id.* Moreover, each report contained written warnings against the sale or use of FEC data. *Id.*

<sup>36</sup> *Id.* at 194.

for informational purposes and not for commercial purposes.<sup>37</sup> The court also concluded that PCD's use of FEC data was "similar" to a newspaper, magazine, or book because "PCD's lists, although not 'traditional' media, are much closer to 'commercial purveyors of news'...than they are to a list of sales prospects. They are designed in a manner that will further first-amendment values and not infringe contributor privacy by abetting solicitors."<sup>38</sup>

Thus, consistent with the legislative history, the Second Circuit read the prohibition to cover list making and list brokering. As explained above, Aristotle's compliance/vetting feature cannot be used for that purpose, because it does not allow committees to search, copy or download the names and addresses of contributors who are not already in their existing data base to create prospecting lists. The feature only permits a committee to view how much someone already in its data base has given to other campaigns and committees.

OGC attempts to avoid the Second Circuit's decision by relying on *FEC v. Legi-Tech* ("*Legi-Tech*"),<sup>39</sup> in which the District of Columbia District Court found a violation of the Act's sale or use prohibition.<sup>40</sup> In that case, Legi-Tech, a for-profit corporation, sold subscriptions for a database that provided the names, addresses and phone numbers of campaign contributors for prospecting and solicitation purposes.<sup>41</sup> With the exception of the phone numbers, all of the data was copied directly from FEC reports.<sup>42</sup> The District Court found that Legi-Tech's use of FEC data was a violation of the sale or use prohibition.<sup>43</sup> However, the court explained that the statute and Commission regulations prohibit "list making: the copying and selling of campaign

<sup>37</sup> *Id.* at 197. The Court held that there was no evidence PCD's clients used the lists for solicitation or commercial purposes noting that only two out of the 100 or more PCD customers admitted to purchasing the reports for solicitation purposes, but that neither actually solicited using the lists because of the lack of addresses and, as one of the two customers noted, because of the inclusion of the written warning stating such actions are prohibited.

<sup>38</sup> *Id.* at 195 (citing *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 192 (D.C.Cir. 1986) (holding that "the brief history of the 'commercial purposes' floor amendment reveals that it was intended to protect campaign contributors from the barrage of solicitations they would receive if 'list brokers' were allowed to sell donor lists on file at the FEC."); *FEC v. International Funding Institute, Inc.*, 969 F.2d 1110, 1118 (D.C. Cir. 1992) (en banc) ("*IFP*") (upholding the constitutionality of the sale or use prohibition, stating that "it does not prevent one from soliciting a person who is on a committee's contributor list, so long as one does not obtain that person's name (directly or indirectly) from a list filed with the FEC.")).

<sup>39</sup> See MUR 5625, General Counsel's Brief # 3 at 12. OGC also cites to the *Legi-Tech* Court's criticism of the *PDC* decision: "[i]n attempting to avoid the constitutional issues, the *Political Contributions Data* court read the phrase 'or for commercial purposes' out of the statute." *Id.* (quoting *Legi-Tech* at 531.).

<sup>40</sup> *FEC v. Legi-Tech*, 967 F. Supp. 523 (D.D.C. 1997).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 525. The evidence showed Legi-Tech was aware of the prohibition against the sale and use of FEC data, and included written warnings against the sale and use of FEC data; however, Legi-Tech marketed the product as an effort to challenge the prohibition, even publicly encouraging the government to bring suit. The evidence also revealed that Legi-Tech knew that its subscribers were using its database for prospecting and solicitation purposes. For example, one customer was using the database to create and market lists while another customer was using the database as means of obtaining names to be used as sources for contributions. *Id.* at 526-527.

<sup>43</sup> *Id.* at 530.

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contributor and contribution information where the principal purpose is the sale of that information, a transaction akin to list-making and brokering.”<sup>44</sup>

OGC’s reliance on *Legi-Tech* is misplaced, as it is factually different than the current matter. In *Legi-Tech*, a union used Legi-Tech’s database “to monitor contributions by its membership and, when it perceived ‘the possibility of getting more contributions’ from certain of its members, it would solicit contributions from those members.”<sup>45</sup> Similarly, a national party committee used the Legi-Tech database “to look up contributors for a particular election cycle and see if they have exhausted (sic) their limit amount to any candidate so that *if not, they can be approached for a further contribution pledge* to one of their affiliated committees.”<sup>46</sup>

OGC seizes on the italicized portion of the court’s statement, arguing that Aristotle’s program allows the same use -- that contributors “can be approached for further contributions” and therefore, is engaged in the same activity the court found was a violation in *Legi-Tech*.<sup>47</sup> However, as Respondent notes, OGC ignores the last part of the Court’s statement -- that the DCCC was using the database to solicit contributions for *other* committees.<sup>48</sup> Similarly, the court found that “Legi-Tech’s sale of contributor information through the CCTS [FEC database] was not only the primary focus of its activity, but, as the FEC points out, was the CCTS’s only purpose.”<sup>49</sup>

What Aristotle is doing is different from the activities of Legi-Tech. On the one hand, Legi-Tech was intentionally selling contributor names, addresses and even phone numbers for prospecting and solicitation purposes. In other words, they were engaging in the sort of list selling and brokering that the statute was intended to prohibit. And the sale of such contributor information was Legi-Tech’s only purpose.

Aristotle, by contrast, was not selling lists. Instead, it was offering one feature as part of an upgrade that included more than fifty features to a software package that already had more than 400 features. The feature, which was provided for free and did not have a separate charge, had a legitimate compliance purpose. By using the feature, a user could determine what a specific person contributed to other committees, which would allow that user to ensure compliance with the various limits imposed by the Act. Aristotle’s compliance/vetting feature does not provide names or contact information for any contributor. Rather the user may only search for contributions for a person whose name and address the user already possessed and may only do so one contributor at a time. Thus, it is impracticable for Aristotle’s customers to create contributor lists using the compliance/vetting feature. Finally, there is no evidence that Aristotle’s customers misused the compliance/vetting feature.

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<sup>44</sup> *Id.* at 531 (citing *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C.Cir. 1986)). See also MUR 5625, Response Brief at 25-26.

<sup>45</sup> *Legi-Tech*, 967 F. Supp at 526-27 (quoting FEC Ex. 12).

<sup>46</sup> *Id.* at 527 n.5 (emphasis in original).

<sup>47</sup> MUR 5625, General Counsel’s Brief at 4.

<sup>48</sup> See MUR 5625, Response Brief at 43.

<sup>49</sup> *Legi-Tech* at 530.

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These decisions bolster the contention that the statute does not prohibit every commercial use or sale of FEC data. Even the *Legi-Tech* court acknowledged that the real purpose of the prohibition is to prevent list brokering.<sup>50</sup> The Second Circuit makes clear what activity is covered by the Act's sale or use prohibition,<sup>51</sup> and the record in this matter demonstrates that Aristotle's compliance/vetting feature is not prohibited.

Past Commission action also precludes pursuing Aristotle. For example, in Matter Under Review ("MUR") 5155, the Commission concluded that the operator of the PoliticalMoneyLine website, TRKC, Inc., was not selling FEC data for a commercial purpose.<sup>52</sup> PoliticalMoneyLine (now CQ MoneyLine) is one of the many websites that republishes FEC data in a way that can be searched and downloaded based on user-specified criteria. PoliticalMoneyLine offered access to FEC data on its website for free; however, it also provided a subscription service that "allow[ed] users to organize and sort large amounts of data more efficiently."<sup>53</sup> The Commission voted to dismiss the matter because TRKC was providing access to the FEC data for free and, therefore, by definition was not a "sale of FEC data for commercial purposes."<sup>54</sup> In addressing the subscription service, the Commission stated that it simply provided the same information a person could get for free, even though it was provided in a format that could be used more efficiently.<sup>55</sup> Similarly, in consolidated MURs 6053 and 6065 (HuffingtonPost.com; PoliticalBase.com), the Commission determined that the republication of FEC data on the HuffingtonPost.com and PoliticalBase.com website did not constitute a "commercial use" under the Act, despite the fact that both used, or had plans to use, the FEC data to sell advertising space on their websites.<sup>56</sup>

Thus, these Commission enforcement matters stand for the proposition that a for-profit entity could provide access to FEC data without violating the sale or use prohibition, even if such access was part of a commercial enterprise. Like TRKC, Aristotle was not specifically charging for FEC data; instead, it was provided to already-existing customers as part of a free upgrade.

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<sup>50</sup> *Id.* at 531.

<sup>51</sup> See *PCD*, 943 F. 2d at 196 (rejecting a "we know it when we see it interpretation of § 438(a)(4)") (internal citations omitted).

<sup>52</sup> MUR 5155 (TRKC, Inc.). PoliticalMoneyLine is now called CQ MoneyLine.

<sup>53</sup> MUR 5155 (TRKC, Inc.), General Counsel's Report # 3 at 10.

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* In fact, Aristotle was selling what a committee could get for free elsewhere but in a different form—a form that could not be manipulated or downloaded.

<sup>56</sup> MURs 6053 and 6065 (HuffintonPost.com). The Commission applied the media exemption in these matters even though the FEC data could be accessed and searched independent of any news article featured on the websites. Although Aristotle did not market its software to academics or the traditional media, it is not at all clear that the media exemption would not apply. This is particularly apparent after *FEC v. Citizens United*, where the Court said "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not." No. 08-205, *slip op.* at 36, 558 U.S. \_\_\_ (2010).

And like TRKC, Huffington Post and Political Base, Aristotle provided data that a customer could otherwise get for free.<sup>57</sup>

The legislative history, court decisions, and Commission enforcement actions appear to demonstrate that the statute does not constitute a *per se* rule against any commercial use of FEC data. Rather the application of 2 U.S.C. §438(a)(4) has consistently been limited to the sale and use of contributor names and contact information to prevent list brokering. Since Aristotle's compliance/vetting feature cannot be used in such a manner, such feature appears to fall squarely within what has previously been deemed to be legal.<sup>58</sup>

**C. Even Assuming that Aristotle Technically Violated the Sale or Use Prohibition, This Matter Should Still be Dismissed as an Exercise of Prosecutorial Discretion**

In addition to the legal arguments discussed above, we supported dismissing this matter as an exercise of prosecutorial discretion. As the Supreme Court stated in *Heckler v. Chaney*,<sup>59</sup> "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise"<sup>60</sup> For example, "the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another."<sup>61</sup>

<sup>57</sup> Certainly, the Commission has found that violations of the sale or use prohibition may have occurred in other matters. For example, in MUR 5155 (TRKC, Inc.), the Commission found reason to believe an individual and two political committees violated the sale or use prohibition by downloading from the PoliticalMoneyLine website the names and addresses of individuals who had contributed to Gore 2000 Inc., and then soliciting those individuals for contributions. This is a paradigmatic violation of the sale or use prohibition (as opposed to what Aristotle did) and is indisputably the type of conduct the provision was intended to cover.

<sup>58</sup> A more permissive interpretation of a statutory provision or regulation by the Commission precludes the Commission from subsequently interpreting the same provision or regulation less permissively in an enforcement matter unless and until the agency provides the public with sufficient notice of its intent to do so and an explanation thereof. See *CBS v. FCC*, 535 F.3<sup>rd</sup> 167 (3<sup>rd</sup> Cir. 2008) (an agency cannot, in an enforcement action, take a substantial deviation from prior enforcement policies without sufficient notice of change in policy). See also MUR 4250 (Republican National Committee), Statement of Reasons of Chairman Darryl R. Wold and Commissioners Lee Ann Elliot and David Mason at 10 (expressing "reservations" about adopting a doctrine that "has not been relied on before by the Commission or the courts in applying the provisions of FECA for the first time in an enforcement action," because doing so "raises significant questions about fair notice to the regulated community, and hence, questions of due process"); MUR 5369 (Rhode Island Republican Party) (by a vote of 4-2 the Commission rejected OGC's recommendation to find reason to believe, on grounds that the respondent had inadequate notice that their activity constituted a violation of the Act); MUR 5564 (Alaska Democratic Party), Statement of Reasons of Commissioners Mason and Von Spakovsky at 2-3 & 10 (When the Commission has not proceeded against a certain type of respondent previously, it should not proceed against similarly situated respondents in the future unless the public has notice through a rulemaking); *FCC v. Fox Television Stations Inc.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1800 (2009).

<sup>59</sup> 470 U.S. 821 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.").

<sup>60</sup> *Id.* at 831.

<sup>61</sup> *Id.*

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Even if Aristotle's use of FEC data was potentially a technical violation of the Act, it is not the type of activity that the Commission should have spent four years worth of resources pursuing. Even assuming soliciting people already found in a pre-existing list is an impermissible solicitation purpose (which is the only possible way that Aristotle's product could have been misused), as OGC acknowledged, there was no evidence that any of Aristotle's customers attempted to create a list or solicit contributions using FEC data.<sup>62</sup> Thus, any violation was, at most, technical,<sup>63</sup> and "an agency generally cannot act against each technical violation of the statute it is charged with enforcing."<sup>64</sup>

Moreover, we do not believe this matter "best fits the agency's overall policies."<sup>65</sup> One of the primary purposes of the Act was to require full reporting of campaign contributions and expenditures. To facilitate and encourage voluntary compliance, the Commission offers its own software program, FECFile, for use at no charge.<sup>66</sup> However, because FECFile is a free service offered to any campaign or committee, it does not provide the broad range of features that other companies, such as Aristotle, can offer. Political committees come in all shapes and sizes—ranging from smaller PACs and campaigns to larger national party committees that may have tens of thousands contributors and spend millions and millions of dollars in an election cycle. The Commission's free software product is simply not an option for a committee operating at that level. Companies such as Aristotle offer these larger, more sophisticated committees a product that makes compliance easier and fulfills the purpose of ensuring their financial activity is accurately and timely disclosed. Such commercial innovation should not be discouraged when it assists the agency in achieving its goal of encouraging compliance by all campaigns and committees.

When stripped to its core, OGC's position would leave no legal way for a company that specializes in FEC compliance software to use FEC data as part of its software product. Not only does this stance not square with the actual language of the Act or its history, it also fails to recognize the legitimate compliance benefits that result from the limited access to FEC data that the Aristotle feature provides. The advantages of allowing for such a use – compliance, technological advancement, ease of use – far outweigh any imagined harm. Thus, in addition to

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<sup>62</sup> MUR 5625, General Counsel's Brief at 12 (noting that the investigation did not uncover an impermissible use of FEC data by Aristotle's customers); compare *PCD*, *supra* note 35.

<sup>63</sup> OGC erroneously alleges a "separate and distinct violation" "when Aristotle touted the CM5 upgrade's use as a solicitation tool, and failed to incorporate warnings on the sale and restriction of FEC data, either internally on the product itself or externally on marketing material, user manuals, and contracts." MUR 5625, General Counsel's Brief at 1. It is undisputed that the early marketing materials failed to include warnings about the prohibitions on the use of FEC data; however, this is not a violation of the Act or Commission regulations because there is no such requirement. As Respondent correctly notes, "there is no legal or factual support for General Counsel's theory of a violation predicated on the absence of a specific *written* warning on the compliance/vetting computer screen for the first few months the feature was offered 5 years ago." MUR 5625, Response Brief at 44-45. Nonetheless, to the extent that such disclaimers serve a prophylactic purpose, Aristotle states that its sales staff was providing oral warnings and that its contracts contained the warnings. *Id.* at 15-16.

<sup>64</sup> *Heckler*, 470 U.S. at 831.

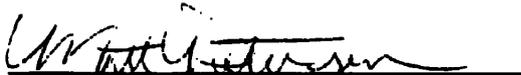
<sup>65</sup> *Id.*

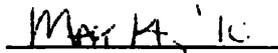
<sup>66</sup> See 2 U.S.C. § 437d(a)(9) (granting the Commission the power to "encourage voluntary compliance.").

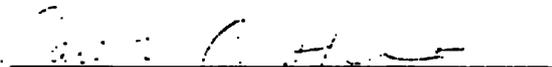
the reasons stated above, we would also not pursue Aristotle and close the file as a matter of prosecutorial discretion.

**III. CONCLUSION**

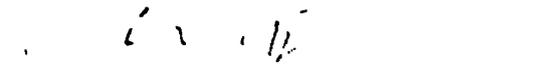
For the reasons stated above, we voted to reject the recommendation to find probable cause to believe Aristotle knowingly and willfully violated the Act.

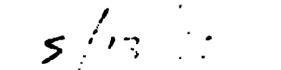
  
Matthew S. Petersen, Chairman

  
Date

  
Caroline C. Hunter, Commissioner

  
Date

  
Donald F. McGahn II, Commissioner

  
Date

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